

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION**

VISTA MARIA, HOUSE OF THE GOOD SHEPHERD¹

Employer

and

Case 7-RC-22876

**MICHIGAN COUNCIL 25, AMERICAN FEDERATION
OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES
(AFSCME), AFL-CIO²**

Petitioner

APPEARANCES:

Sheryl A. Laughren, Attorney, of Detroit, Michigan, for the Employer.
Bruce A. Miller and Njaire Shabazz, Attorneys, of Detroit, Michigan, for the
Petitioner.

DECISION AND DIRECTION OF ELECTIONS

Upon a petition filed under Section 9(c) of the National Labor Relations Act,
a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has
delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,³ the undersigned finds:

1. The hearing officer's rulings are free from prejudicial error and are
hereby affirmed.

¹ The Employer's name appears as amended at hearing.

² The Petitioner's name appears as corrected at hearing.

³ The Employer and Petitioner filed briefs, which were carefully considered.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

Petitioner seeks to represent approximately 160 employees in a single unit comprised of approximately 85 direct care workers, 45 youth counselors, 6 transporters, 15 team leaders, RNs, LPNs, 7 program supervisors, 8 caseworkers, and 7 maintenance employees, employed by the Employer's at its Dearborn Heights, Michigan facilities. The Employer contends that, with the exception of the RNs, LPNs, caseworkers, and maintenance employees, all petitioned-for classifications are guards under Section 9(b)(3) of the Act and cannot be represented by Petitioner, as Petitioner also represents nonguard employees. The Employer further contends that program supervisors and team leaders are supervisors under the Act. Finally, the Employer asserts that maintenance employees do not share a sufficient community of interest with RNs, LPNs, and caseworkers to warrant their inclusion in a single unit.

I find that direct care workers, youth counselors, transporters, and team leaders are guards as defined under Section 9(b)(3) of the Act and cannot be represented by Petitioner, as Petitioner admits nonguard employees to membership. I further find that program supervisors and team leaders are supervisors under Section 2(11) of the Act and should be excluded from any appropriate unit on that basis as well. Finally, I find that RNs, LPNs and caseworkers may comprise an appropriate unit⁴ and maintenance employees comprise a second, separate appropriate unit.

The Employer's Operations

The Employer operates low to medium security residential treatment facilities for approximately 180 females between the ages of 11 and 17, offering various educational curriculums and behavioral programs. The females are

⁴ Because RNs are professionals and LPNs and caseworkers are not, the desires of the RNs must be ascertained as to inclusion in a unit with nonprofessional employees as delineated at the conclusion of this decision.

assigned to the facilities via referral by either the State of Michigan's child welfare system, the Michigan Department of Human Services, or by court order. Approximately sixty percent of the residents are placed at the Employer's facilities by the Michigan juvenile court system as a result of criminal behavior, involving assaultive and/or drug related conduct. The Employer does not accept those children who are severely developmentally disabled or have engaged in criminal behavior warranting a high security environment, such as those who have committed murder or other very serious offense. Those children who arrive at the Employer's facilities via the Michigan child welfare system or the Michigan Department of Human Services are in need of psychiatric care, or are victims of neglect or sexual abuse. They have usually been unsuccessful in less restrictive environments, such as community placements, foster homes and/or group homes.

The Employer is licensed by the Michigan Department of Human Services to care for and treat both criminal and noncriminal residents. The licensing dictates various aspects of the Employer's operations, such as the physical environment of the campus, treatment of the residents, types of meals, size of residents' bedrooms, and the types of locks on the residents' bedroom doors. Periodically, the Michigan Department of Human Services sends an auditor or inspector to the Employer's premises to examine its facilities and services to ensure adherence to state licensing requirements.

The Employer's facility sits on approximately 35 acres and consists of an administration building and 6 residence halls. The only ingress and egress into or out of the campus is through a gated drive, manned by a uniformed security guard 24 hours a day.⁵ Those residents entering one of the programs via the Michigan juvenile court system normally are transported in shackles to the Employer's facilities by a State employee. All other incoming residents typically are not restrained. All visitors must sign in and out at the guard gate. Visitors can include family members, friends, and legal counsel. Once visitors sign in, they drive unescorted to the residential building for their visit.⁶ Along with managerial, human resources and clerical offices, the administration building contains a middle school and high school. The school's faculty, including a principal, teachers, a counselor, and a special education teacher, is provided by the City of Dearborn Heights public school system. The administration building also contains Delores Hall, the Lourdes Building, Donna Maria Building and Miriam House, are

⁵ There are no other uniformed guards on the premises.

⁶ The uniformed security guard at the gate does not search the visitors' person. At hearing, there was conflicting testimony as to whether visitors are routinely searched once at the residential building.

separate, three floor structures. All have access to courtyards and the administration building's gymnasium for the children's supervised and unsupervised recreational use. Each residence hall also has a small cafeteria where breakfast is served, and contain supervisors' offices, a living room, small classrooms, and a behavior management room. The Employer operates seven different youth programs out of the six residential buildings designed for the specific needs of the residents. Five of the programs are designated "medium secure" and two are designated "low secure." There are 180 beds at the facility, with approximately 140 designated as medium secure, and the remainder as low secure.

The medium secure programs are the Special Care Unit (SCU), Unity Program, Grace Program, Girls Care Recover/Restorative Juvenile Justice Program, and the Good Shepherd Program. These programs cater to residents who may have any number of legal, personal and health issues, including psychosis and substance abuse problems, and those that have been found guilty of such crimes as assault or even attempted murder. Many are victims of sexual or emotional abuse and have a history of neglect or severe trauma. Almost all residents of the medium secure programs have aggressive or violent tendencies and/or mental illness and most, if not all, are high truancy risks.

In each medium secure program, the Employer maintains a staff that oversees the residents 24 hours a day, with a ratio of between 1:4 and 1:5 staff to residents during the day, depending on the program⁷ and a 1:10 ratio at night. The staff assigned to the various residences typically consists of direct care workers, transporters, youth counselors, and team leaders. All staff within the residential units wear identification badges. They are required to maintain a 100% line-of-site supervision over the residents during the day at all times, whether inside or outside the residential facility. Overseeing this staff within each program are program managers and program supervisors. Also onsite regularly are therapists, caseworkers, a registered nurse (RN) and a licensed nurse practitioner (LPN).

Though there are slight variations, the supervision and care for the residents in each of the residence halls that contain the five medium secure programs are essentially the same. The main door into and out of each residential building, which house between approximately 20-30 residents, is locked at all times and can be

⁷ Unity and SCU maintain a 1:4 ratio during the day. Grace, Girls Care Recovery, and Good Shepherd maintain a 1:5 daytime ratio.

opened only by a member of the staff who carries a key.⁸ The doors to the stairwells leading to and from each of the three floors remain locked when not in use and can be opened only by members of the Employer's staff. The recreational courtyards of the medium secure programs are enclosed by 40 foot high fences, some topped with barbed wire.

The two low secure programs are the Vision Program and the Bridges Program. The low secure programs cater to residents who have psychiatric issues, but have made progress in their treatment to the point where their behaviors have been stabilized, those who do not pose a runaway risk, and those who are not aggressive. Some residents living in the low secure program are transferees from the medium secure program where sufficient progress has been made in their treatment and they no longer require a medium secure environment. The main difference between medium secure and low secure programs is that residents in low secure programs have a substantially higher freedom of movement within and outside their residential facilities. The increased freedom of movement is a result of the stairwells and the residents' bedroom doors not having locks. Exterior doors are only locked at night. Additionally, while 24 hour a day supervision is required, the supervision is not 100% line-of-site as it is in the medium secure programs. Thus, while staff must generally be aware of the residents' location, the residents are free to traverse the grounds unsupervised. The proscribed staff-to-resident daytime ratio for the low secure programs are 1:4 for the Bridges program and 1:7 for the Vision program. Both programs require a 1:10 ratio at night.

Supervision

The administration building houses all management personnel and the human resources department. The "hands on" supervision is predominantly performed by unit managers and program managers⁹ within the six resident houses. They directly supervise direct care workers, youth counselors, transporters and team leaders.¹⁰

⁸ Rose Hall utilizes electronic access cards instead of keys in some areas of the building.

⁹ The title depends on the program and the terms will be used interchangeably.

¹⁰ The parties did not stipulate to the supervisory status of various managers and supervisors, specifically Employer President Cameron Hosner, Chief Operating Officer Patricia A. Lynett, Chief Financial Officer Earl Goddin, Director of Human Resources Michelle Cheatio, Human Resources Manager Cliff Klug, Facilities Supervisor Jerry Fitzgerald, and unit or program managers Sonia Fernandez, Meredith Reese, Yolonda Shell, LaTonya Howard, and Debra Dixon. However, Petitioner does not appear to seek to represent these classifications and I find all to be supervisors under Section 2(11) of the Act or managerial employees. Hosner, Lynett, Goddin, Cheatio, and Klug are managerial employees, Fitzgerald possesses the authority to responsibly direct work, and Fernandez, Reese, Shell, Howard and Dixon, among other indicia, have the authority to discipline employees, up to and including discharge.

The Employer's highest ranking official is President Cameron Hosner, although he is not directly involved in the day-to-day operations. Chief Operating Officer Patricia A. Lynett and Chief Financial Officer Earl Goddin oversee the Employer's day-to-day managerial functions and both report directly to Hosner.

Director of Human Resources Michelle Cheatio handles recruiting, employee relations, and employee and resident file maintenance and reports to Lynett. Also on the human resources staff is Manager Cliff Klug, who reports directly to Goddin. As part of her employee relations duties, Cheatio oversees the Employer's appraisal and evaluation process, with employees receiving a performance appraisal within 90 days of hire and then monthly and annually thereafter. The human resources department receives the evaluations from unit supervisors and team leaders, who actually give the performance evaluations. The evaluation scores are then entered into the system and filed in the employee's personnel file. The employees' appraisal scores are directly linked to subsequent raises, with higher scores resulting in a larger pay increase and vice versa. As part of its maintenance of employee personnel files, the human resources department also retrieves any files and documents related to the Employer's four-step disciplinary process. As in the case of performance evaluations, it makes no recommendations in regard to discipline, although it may be consulted if a clarification of the Employer's policy is needed. The four-step disciplinary process consists of a verbal warning, a written warning, a final written warning and discharge. Unit or program managers, unit supervisors and team leaders all have authority to issue verbal and written warnings. Only unit or program managers and unit supervisors have the authority to issue final written warnings and only the unit or program manager has the authority to discharge an employee. The human resources department also issues an employee handbook, which is applicable to all employees.

Within each of the seven programs, the unit or program manager oversees operations of his or hers individual program. Program supervisors¹¹ report directly to their respective program or unit manager, while team leaders, youth counselors, direct care workers and transporters, in turn, report directly to a program supervisor. Program supervisors oversee their shift to ensure that residents are receiving their medication and ensuring that the direct care workers, youth counselors and transporters are performing their jobs adequately. Program supervisors give annual performance evaluations to direct care workers, youth counselors, team leaders and transporters, and are authorized to discipline, up to

¹¹ Some programs utilize unit supervisors as opposed to program supervisors, but their duties appear to be identical and the terms will be used interchangeably.

and including recommending discharge.

Outside of the seven programs, the Employer has a facilities department, responsible for maintaining all the buildings' boilers and generally overseeing the entire grounds. Head of that department is Facilities Supervisor Jerry Fitzgerald.

Classifications, Duties and Working Conditions of the Petitioned-for Unit

A. Program Supervisors

Each of the seven programs has a program supervisor, who are responsible for overseeing and reviewing the work of direct care workers, youth counselors, team leaders and transporters, and to ensure that residents receive their medication and treatment. As part of the review process, program supervisors provide monthly and annual performance evaluations of direct care workers, team leaders and youth counselors, rating them in a number of different performance categories. The evaluations are used by the Employer in determining raises. Program supervisors also have the authority to discipline, up to and including discharge. In discharge situations, they do not personally discharge employees. They send the discharge documents to the human resources department, which ultimately takes the appropriate action. Program supervisors regularly conduct interviews of applicants for the direct care worker, youth counselor, and team leader positions. After the interview, they complete an interview worksheet, listing the strengths and weaknesses of the candidate. The worksheet is sent to the human resources department which reviews it and, based on the scores submitted by the program supervisor, makes a hiring decision on that candidate. If more than one applicant is interviewed, the human resources department contacts the program supervisor and solicits an opinion as to which candidate is recommended.

In terms of their oversight responsibilities, program supervisors must approve the use of restraining equipment on residents and make the determination as to whether a resident is in need of being placed in the behavior management room. They also check the audio and video monitoring systems within the programs.

B. Direct Care Workers, Youth Counselors, Team Leaders, and Transporters

There are approximately 85 direct care workers, 45 youth counselors, 15 team leaders and 6 transporters employed within the seven resident treatment

programs. While the duties of each classification vary somewhat depending on their title and whether they are employed in a low or medium secure program, all share certain responsibilities with respect to the residents. They also are the only classifications that are included in the prescribed ratios of staff-to-resident described earlier. Transporters are essentially direct care workers who have the additional responsibility of driving residents to court hearings, medical appointments or other treatment related destinations. When they are not transporting residents, they are essentially direct care workers and any description of direct care workers' duties with respect to resident care include the transporter classification. Unless otherwise noted, direct care workers, youth counselors, team leaders, and transporters will be referred to as “resident care staff” in describing their core responsibilities.

Upon hire, resident care staff, as well as any other employee assigned to any of the six buildings, are given 50 hours of nonviolent restraint training to keep residents from harming themselves and others when they become physically assaultive. They are required to undergo 25 hours of additional training each year. While resident care staff are hired into one particular program, all are interchangeable between the seven programs. If one program is short-handed due to call-offs, an employee in another program may be sent to the short-handed program.

The Employer operates three partially overlapping shifts with respect to the resident care staff: the first shift is from 7:00 a.m. to 4:00 p.m.; the second shift is from 3:00 p.m. to 11:00 p.m.; and the third shift from 11:00 p.m. to 8:00 a.m. A typical day for first shift resident care staff member in both medium and low secure programs begins with their arrival at their assigned building and meeting with their counterparts from the previous shift. During the overlap time, the resident care staff from the previous shift discuss any issues with the new shift that may need special attention, such as a particular problem with a resident. Direct care workers as well youth counselors from the previous shift fill out a team “communications book” and make entries regarding the behavior of all the residents in the program. Additionally, resident care staff also fill out resident expectation sheets for each resident, outlining the residents' goals and accomplishments for the day within each program.

On first shift, once first shift has conferred with third shift, the resident care staff on both shifts in a medium secure program will go into the unit by unlocking the door in the stairwell leading to the residents’ sleeping quarters. They then lock the door behind them and unlock all the residents’ doors to let the residents out for

showers. The resident care staff next performs a head count, a task that is performed throughout the day. The residents' shower time is always supervised by resident care staff to make sure clients are safe and not doing anything inappropriate in the shower. In the low secure programs, resident care staff's duties are essentially the same, except that none of the doors leading to the resident's living quarters are locked.

Once the residents shower, they return to their rooms. With the resident care staff monitoring the hallway, the residents dress in their uniforms. The resident care staff then transports them to breakfast. Residents are escorted in an organized line as they count off to ensure that they are all present, a practice routinely performed every time residents are transported from one place to another. While the residents sit down for breakfast, resident care staff monitor them to make sure they eat and for safety and security reasons. After breakfast, the residents line up and the resident care staff perform another head count. In medium secure programs, they also personally search residents for contraband. Resident care staff then escort the residents to school. The residents are required to walk in a line, doubled up and arm-in-arm. During the residents' walk to school, generally two of the resident care staff carry walkie talkies to alert fellow staff members in the event a resident attempts to escape.

While the residents are at school attending classes, resident care staff sit in a designated area in the classroom hallways with a direct line of site of the classroom door, to ensure that no resident leaves the classroom without permission. For lunch, the residents are escorted out of the classroom and led to the main cafeteria in the same manner as they were escorted to class, in a line, arm-in-arm. During lunch, resident care staff remain in the cafeteria in the appropriate staff-to-resident ratio.

After classes are over for the day, residents are escorted by resident care staff to the main cafeteria for dinner. After dinner, in medium secure programs, residents undergo a second search for any contraband, in the same manner as they were searched in the morning.¹² Resident care staff in both low and medium secure programs perform a head count at this time. After the head count, residents in both the low and medium secure programs are escorted back to their living quarters in the same organized manner they left their living quarters in the morning. Once back at their living quarters, residents have recreational time or one-on-one therapy time with a therapist or youth counselor until 9:15 p.m., when the residents are

¹² In addition to searches of their person, residents in the medium secure programs are subject to room searches for contraband as often as twice a week.

escorted to their rooms. "Lights out" is at 11:00 p.m. Typically, two residents share a bedroom. In medium secure programs, the bedroom doors are locked at night and can be opened only by staff. As a further security measure, the windows in the residents' bedrooms of medium secure programs are covered by metal screens to prevent escape. Staff perform bed checks on the residents every 30 minutes using a flashlight, to ensure that residents are in their respective rooms, sleeping. These checks are noted on a security checklist report filled out by the staff member who performs the bed check. At night, all rooms are monitored for sound by resident care staff or a supervisor, via microphones in the residents' bedrooms.¹³ In the event a resident of a medium secure program needs to use the bathroom, for safety and security reasons, two staff members go to the resident's bedroom and escort her to and from the bathroom. Those residents in low security programs are allowed to walk to the bathroom unsupervised.

There have been a number of behavioral incidents involving residents, particularly in the medium secure programs.¹⁴ Though behavioral incidents are less frequent in low secure programs, they still do occur on a regular basis.¹⁵ Things such as assaults, truancy, verbal abuse, and other behavioral issues are a fairly common occurrence. In both medium and low secure programs, resident care staff, supervisors and sometimes therapists are designated to resolve such occurrences which, for the most part, can be handled by a single staff member. However, at times when a situation escalates or when a resident refuses a directive from staff, a "clear the area emergency" will be called.¹⁶ For a clear the area emergency, staff will either yell out or use a walkie-talkie to call more staff members to the scene. All residents are required to return to their rooms. In dealing with the situation, resident care staff may restrain a resident by using leg braces or even handcuffs, although the use of handcuffs appears fairly rare.¹⁷ If a resident's behavior is such that restraint is necessary, she may be placed in the behavior management room by resident care staff until her behavior is under control. All resident care staff are required to detail the events in an incident report, which is provided to their

¹³ The Unity and SCU programs also maintain video monitors in certain areas.

¹⁴ According to the Employer's incident report summary, there were 825 incidents from January 1, 2005 through March 30, 2005. Of these, 733 incidents were reported in the medium secure programs, ranging from lost keys to the rape of a resident.

¹⁵ From January 1, 2005 through March 30, 2005, there were 92 incidents reported in the two low secure programs, ranging from truancy to predatory sexual behavior.

¹⁶ There were 5 clear the area emergencies in the medium secure programs and none reported in the low secure programs from January 1, 2005 through March 30, 2005.

¹⁷ From January 1, 2005 through March 30, 2005, there were 122 instances where restraint was used on residents within the medium secure programs and three instances in the low secure programs. It is not clear whether leg braces or handcuffs were used in each instance.

supervisor. If a resident is restrained, the incident report must be forwarded to the Employer's Consumer Rights Officer.

In addition to the core responsibilities outlined above, youth counselors, who have advanced degrees, in contrast to some, if not all direct care workers, are responsible for providing the residents 90 minutes of individual counseling per week. Youth counselors have the same two to three residents regularly assigned to them and work closely with therapists. When they are not counseling residents, they essentially function as direct care workers.

Team leaders, too, have responsibilities not shared by direct care workers, transporters and youth counselors, particularly in the areas of discipline and oversight of their programs. In regard to discipline, team leaders have the authority to discipline direct care workers and others for policy violations, such as poor attendance or tardiness. Those disciplines are forwarded to the human resources department, which uses the violations in the Employer's progressive discipline policy. In terms of oversight, when the program supervisor has days off, commonly on the weekends, team leaders function as a program supervisor in regard to the daily distribution of medication to residents and deciding if a resident needs to be placed in restraints or sent to the behavioral management room. Only team leaders and program supervisors have the combination to a safe kept at each resident facility, which holds the residents' personal items, such as identification, money, and jewelry. Team leaders also assist in performing monthly and annual performance evaluations of other resident care staff.

C. Registered Nurses (RNs) and Licensed Practical Nurses (LPNs).

The RNs and LPNs are not required to supervise residents, but instead tend to their physical needs. The record is not clear as to the number of RNs and LPNs at the Employer's facilities, and does not describe their specific duties. The Employer does not contest the inclusion of the LPN classification in an appropriate nonprofessional unit. The Employer asserts that while the RNs are not guards, they are professionals and do not have a community of interest with nonprofessionals.

D. Caseworkers.

There are eight caseworkers at the Employer's facilities. A caseworker is required to have a college degree in counseling. They share an office with the program supervisor in the performance of their duties. They are not part of the

required staff-to-resident ratio within the seven programs. Each resident has a caseworker assigned to her. The caseworkers perform some counseling functions¹⁸ and approve the visitors' list for the residents under their care. They normally do not transport residents to appointments, but have on some occasions. As all staff, they are trained in nonviolent restraint techniques, but rarely have a need to use such techniques on unruly or uncooperative residents. The Employer does not contest the inclusion of the caseworker classification in an appropriate unit.

E. Maintenance Employees

There are seven maintenance employees, which include three full-time and three part-time employees, as well as a custodian. The part-time maintenance employees are generally responsible for performing yard work, while the full-time maintenance employees perform tasks related to the upkeep of the seven buildings, such as changing light bulbs, maintaining the boilers, patching holes in walls, repairing broken windows, and repairing block. The custodian's duties include general cleaning, such as emptying trash in the dining areas, the recreational areas, and inside the school. While they do not wear uniforms, maintenance employees wear identification badges identical to direct care workers, youth counselors, transporters, and team leaders. Maintenance employees have little or no contact with the residents and, in fact, are instructed not to enter a room scheduled for repair if a resident is in that room. Their pay range is between \$9.50 and \$12.00 an hour. Maintenance employees receive the same benefits as all other hourly employees.

Analysis

A. The Section 9(b)(3) Status of Direct Care Workers, Youth Counselors, Transporters, and Team Leaders

Section 9(b)(3) of the Act prohibits a labor organization from representing guards if, like the Petitioner, it admits nonguards to membership. The Petitioner takes the position that the employees sought by it are not guards within the meaning of the Act.

Section 9(b)(3) defines that the function of a guard is to enforce rules for the protection of the employer's property and the safety of the persons on that employer's premises. See *The Boeing Co.*, 328 NLRB 128, 129-130 (1999).

¹⁸ There was very little information in the record as to the exact duties of caseworkers and no job description was submitted into evidence.

Employees may be classified as statutory guards even if their guard duties are not their exclusive function. In such cases, the Board analyzes whether another classification exists within the employer's operation that performs traditional guard functions, before making a determination as to the Section 9(b)(3) status of petitioned-for employees. In *A.W. Schlesinger Geriatric Center, Inc.*, 267 NLRB 1363 (1983), the Board found that two maintenance employees were statutory guards where they spent between 50 to 70% of their time performing guard work formerly performed by a guard service. The Board found that as a result of the performance of their nonmaintenance duties, i.e., locking and unlocking doors and gates, making hourly rounds of the parking lot and facility, standing by the doors to observe shift changes to determine which employees were carrying packages, and to assure the safety of employees arriving and leaving for work, they were guards under Section 9(b)(3) of the Act. The Board acknowledged that the maintenance employees had no special guard training and did not wear guard uniforms or carry firearms, but reasoned that the employer had no other security force on the premises and that in performing their security functions, they enforced specific rules against employees and nonemployees to protect the safety of persons on the employer's premises, kept unauthorized persons off the property, and generally protected the premises.

The Board has performed a like analysis at facilities similar to the Employer's in the instant case. In *Crossroads Community Correctional Center*, 308 NLRB 558 (1992), the employer operated a work release program for adult inmates nearing the completion of their sentences. Employees responsible for security, care and treatment of the inmates were divided into two segments. The 13 case managers, all of whom had college degrees, offered inmates employment counseling and other mental health therapy. The duties of the 45 correctional residence counselors (CRCs) within the security department were to, among other things, "frisk" persons and employees entering the facility for contraband, perform head counts of residents, conduct "shakedowns" of rooms, accompany residents to the cafeteria and to court, insure that the residents did not escape, and notify supervisors in the event of a disturbance caused by inmates. CRCs were not required to have a college degree. They received training in completing forms, handling prisoners, using a walkie-talkie, and how to conduct a search. None were trained in the use of firearms or in self-protection techniques. None wore uniforms. CRCs did not counsel inmates as part of their job duties. Residents were allowed to walk around freely on their floor and each resident had a key to their room only. The Board concluded that CRCs were guards, finding that CRCs enforced against employees, residents, and other persons rules to protect the safety of persons on the employer's premises, kept unauthorized persons off the property, and protected the

employer's premises. Cf. *George Junior Republic*, 224 NLRB 1571 (1976)(the Board found that "nightmen" and "custodial care" employees at a home for delinquent boys, whose main function was to insure that the juvenile residents did not leave the premises at night, were not statutory guards. The Board reasoned that four "security" employees, who patrolled the grounds of the institution to "prevent fire, theft, illegal entry, and trespassing", performed the employer's main security functions and therefore were guards under Section 9(b)(3) of the Act.)

In *Corrections Corporation of America*, 327 NLRB 577 (1999)(“CCA”), the employer operated a facility that housed inmates who required drug treatment and mental health services. Before inmates were sent to the employer's facility, they were classified as maximum, medium, or minimum security and placed in the appropriate program depending on that security level, as well as other factors. Correctional Officers (CO's) performed a wide variety of duties depending on the particular post they were assigned. In general, CO's were responsible for security and the prevention of escapes and injuries to inmates. They would, among other things, pat-search visitors and inmates looking for drugs and other contraband, coordinate inmates' visits to local hospitals, escort inmates to various locations within the employer's facility, such as the education or library areas, monitor security cameras, and perform head counts. The CO's typically underwent one month of correctional training. Some received special training in the use of handcuffs, leg irons and belly chains, so that they could use those devices to restrain inmates, as well as pressure point techniques used to subdue inmates. Many CO's were certified to carry firearms and carried two-way radios that were used to communicate with the command center if the CO needed assistance in dealing with a violent disturbance. CO's also performed “shakedowns” of inmates to prevent the possession of contraband. The Board found CO's to be Section 9(b)(3) guards, finding the indicia of guard status was stronger than in *Crossroads*, predominantly because the CO's carried firearms and were trained in the use of restraints and pressure point techniques and, when instructed to do so by a supervisor, removed unruly inmates.

An important factor in determining guard status, and significant in the Board's findings in *A.W. Schlesinger Geriatric Center*, *George Junior Republic*, and *CCA*, is whether other statutory guards are present on the sites in question. The existence of other statutory guards tends to mitigate the guard status of other employees. In the instant case, other than one guard stationed at the entrance of the campus, there is no other traditional guard on duty anywhere on the Employer's premises. Moreover, that one guard does not patrol the grounds and there is no evidence that the guard has ever entered any of the campus buildings for any

reason. The record is clear that direct care workers, youth counselors, transporters, and team leaders have sole responsibility for performing security functions within the resident halls, similar to the employees in *A.W. Schlesinger Geriatric Center*, *CCA*, and *Crossroads*, and in contrast to the nightmen and custodial care employees in *George Junior Republic*.

In examining other factors used in determining guard status, similar to the CRCs in *Crossroads*, direct care workers, youth counselors, transporters and team leaders all perform head counts of residents, search rooms, accompany residents to the cafeteria, insure that residents do not escape, and use walkie-talkies. Additionally none wear uniforms or are required to have a college degree or training in the use of firearms. Like the CO's in *CCA*, direct care workers, youth counselors, transporters, and team leaders all are trained in restraint techniques, perform "shakedowns" of inmates, escort residents to various locations within the campus, as well as appointments outside the campus, perform regular head counts, and assist in quelling violent disturbances.

Petitioner argues in its brief that the Employer operates facilities that cater to residents less violent and less criminal than those employers in other cases. While in *Crossroads* and *CCA*, the employers operated facilities that catered to at least some residents that may have committed more serious offenses than the residents in the instant case, that factor was not significantly relied on in deciding that those petitioned-for employees were guards. Rather, the analysis focused on the specific duties of the employees.¹⁹

In analyzing the instant case in light of all the factors highlighted by the Board in relevant case law, direct care workers, youth counselors, transporters, and team leaders in both the low and medium secure programs overall possess sufficient key indicia in important areas to conclude that they are guards under Section 9(b)(3) of the Act. The core duties of those classifications are to enforce the Employer's rules for the safety of residents, staff and visitors, and for the protection of the Employer's property.

¹⁹ In its brief, Petitioner relies on *McLean Hospital Corp.*, 309 NLRB 564 (1992), for its assertion that direct care workers, youth counselors, transporters, and team leaders are not statutory guards. Such reliance is misplaced. That case did discuss mental health specialists who performed some of the same functions as direct care workers, youth counselors, transporters, and team leaders. However, *McLean* dealt with whether a proposed skilled maintenance unit was appropriate. Mental health specialists were not included in the unit and no Section 9(b)(3) issues were raised or discussed.

B. Supervisory Status of Program Supervisors and Team Leaders

Section 2(11) of the Act defines a "supervisor" as:

. . .any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The primary supervisory indicia enumerated in Section 2(11) of the Act are read in the disjunctive, so that possession of any one of the 12 listed authorities can invest an individual with supervisory status. *Phelps Community Medical Center*, 295 NLRB 486, 489 (1989); *Cannon Industries, Inc.*, 291 NLRB 632, 636 (1988). The burden of proof rests with the party seeking to exclude the individual as a supervisor. *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001); *Benchmark Mechanical Contractors, Inc.*, 327 NLRB 829 (1999). The Board is mindful not to deprive employees of their rights under Section 7 of the Act by interpreting the term supervisor too broadly. *Unifirst Corp.*, 335 NLRB 706, 712-713 (2001).

The Employer contends that program supervisors and team leaders, who I have already found to be guards under Section 9(b)(3) of the Act, are supervisors within Section 2(11) and should be excluded from the bargaining unit on that basis. Program supervisors provide monthly and annual performance evaluations of employees that have a direct bearing on what amount of raise, if any, will be given to these employees. An individual who evaluates and effectively recommends rewarding other employees is a supervisor under the Act. *Wal-Mart Stores, Inc.*, 335 NLRB 1310, 1310, 1315-16 (2001). Further, program supervisors have the authority to discipline, up to and including discharge, as well as effectively recommend hire. The record as to team leaders is clear in that they possess the authority to discipline for attendance violations by employees. Such disciplines are sent to the Employer's human resources department, kept in the employee's personnel file, and used in the Employer's progressive discipline policy without further investigation or review. See *Wedgwood Health Care*, 267 NLRB 525 (1983). Additionally, on weekends or other times a program supervisor is not available, a team leader will perform the program supervisors' functions. Further, team leaders play a role in the monthly and annual performance evaluations of resident care staff.

Based upon the record, I find the Employer has met its burden of proof with respect to its contention that program supervisors and team leaders possess Section 2(11) indicia. Therefore, on that basis, those classifications are excluded from any appropriate unit.

C. Unit Findings Regarding RNs, LPNs, Caseworkers, and Maintenance Employees

1. Registered Nurses (RNs), Licensed Practical Nurses (LPNs), and Caseworkers

Section 2(12)(a) of the Act defines professional employees as those who meet four conjunctive criteria: employees must be engaged in work that is (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes. The Board has traditionally held that registered nurses meet such criteria and are professional employees. *Centralia Convalescent Center*, 295 NLRB 42 (1989), citing *Mercy Hospitals of Sacramento*, 217 NLRB 765 (1975). I find, based on established Board law, that the RNs are professional employees within the meaning of the Act.

Unlike RNs, the duties of LPNs and caseworkers do not require the same level of advanced knowledge. Based on Board law and the evidence in the record, I conclude that LPNs and caseworkers are not professional employees. In fact, the Board consistently holds that LPNs are technical employees. See e.g. *Bay Medical Center, Inc.*, 219 NLRB 620, 621 (1975). At hearing, the parties agreed that LPNs and caseworkers are appropriately included in the petitioned-for unit. Further, while the record is somewhat scant, I find the RNs share a sufficient community of interest with LPN's and caseworkers to be included in the same unit should the RNs so desire.

2. Maintenance Employees

At hearing, the Employer asserted that maintenance employees do not share a community of interest with the other petitioned-for classifications. Indeed, maintenance employees, whose duties include such relatively unskilled tasks as changing light bulbs, maintaining the boilers, patching holes in walls, repairing broken windows, repairing block and emptying trash in the dining areas, report to a different supervisor and have little contact with RNs, LPNs and caseworkers. They also have little contact with, and no authority over, the residents. Common supervision and the nature of employee skills and functions are key factors affecting ultimate unit determinations. See *Harron Communications, Inc.*, 308 NLRB 62 (1992); *Overnite Transportation Co.*, 331 NLRB 662, 664 (2000). Thus, I find maintenance employees do not share a sufficient community of interest with RNs, LPNs or caseworkers to warrant their inclusion with those classifications in a single unit. I do find, however, that they comprise a separate appropriate unit.

Conclusion

In view of the foregoing, I find that the following employees of the Employer constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time RNs, LPNs and caseworkers employed by the Employer at its facility located at 20651 West Warren, Dearborn Heights, Michigan; but excluding managerial employees, maintenance employees, and guards and supervisors as defined in the Act.

All full-time and regular part-time maintenance employees employed by the Employer at its facility located at 20651 West Warren, Dearborn Heights, Michigan; but excluding managerial employees, RNs, LPNs, caseworkers, and guards and supervisors as defined in the Act.

The unit including RNs, LPNs and caseworkers set out above includes professional and nonprofessional employees. However, the Board is prohibited by Section 9(b)(1) of the Act from including professional employees in a unit with nonprofessional employees unless a majority of the professional employees vote for inclusion in such a unit. Accordingly, the desires of the professionals must be ascertained as to inclusion in a unit with nonprofessional employees.

I shall, therefore, direct separate elections in the following voting groups:

Voting Group A ²⁰

All full-time and regular part-time LPNs and caseworkers employed by the Employer at its facility located at 20651 West Warren, Dearborn Heights, Michigan; but excluding managerial employees, RNs, maintenance employees, and guards and supervisors as defined in the Act.

Voting Group B ²¹

All full-time and regular part-time RNs employed by the Employer at its facility located at 20651 West Warren, Dearborn Heights, Michigan; but excluding managerial employees, LPNs, caseworkers, maintenance employees, and guards and supervisors as defined in the Act.

Voting Group C

All full-time and regular part-time maintenance employees²² employed by the Employer at its facility located at 20651 West Warren, Dearborn Heights, Michigan; but excluding managerial employees, RNs, LPNs, caseworkers, and guards and supervisors as defined in the Act.

The employees in nonprofessional voting group (A) will be polled to determine whether they wish to be represented by the Petitioner. The employees in professional voting group (B) will be asked the following two questions on their ballot:

²⁰ As a result of an election being directed in units other than what Petitioner sought, if Petitioner does not wish to proceed to an election, it may withdraw its petition without prejudice by notice to the undersigned within 7 days from the date of this Decision and Direction of Elections.

²¹ As a result of an election being directed in units other than what Petitioner sought, if Petitioner does not wish to proceed to an election, it may withdraw its petition without prejudice by notice to the undersigned within 7 days from the date of this Decision and Direction of Elections.

²² As a result of an election being directed in a unit other than what Petitioner sought, if Petitioner desires to go to an election in this unit, it is accorded a period of 14 days from the date of this Decision and Direction of Elections in which to submit to the undersigned an additional showing of interest. If no additional showing of interest is submitted, the petition as it pertains to maintenance employees will be dismissed. In the event the Petitioner does not wish to proceed with the election, it may withdraw its petition as it pertains to maintenance employees without prejudice by notice to the undersigned within 7 days from the date of this Decision and Direction of Elections.

- (1) Do you desire to be included with nonprofessional employees in a single unit for the purposes of collective bargaining?
- (2) Do you desire to be represented for the purposes of collective bargaining by Michigan Council 25, American Federation of State, County, and Municipal Employees (AFSCME), AFL-CIO?

If a majority of the professional employees in voting group (B) vote “Yes” to the first question, indicating their wish to be included in a unit with nonprofessional employees, they will be so included. Their votes on the second question will then be counted together with the votes of the nonprofessional group (A) to determine whether the employees in the overall unit wish to be represented by the Petitioner. If, on the other had, a majority of professional employees in voting group (B) vote against inclusion, they will not be included with the nonprofessional employees. Their votes on the second question will then be separately counted to determine whether they wish to be represented by the Petitioner in a separate unit.²³

Thus, the unit determination is based, in part, upon the results of the election among the professional employees. However, I make the following findings in regard to the appropriate unit:

If a majority of professional employees vote for inclusion in the unit with nonprofessional employees, I find the following two groups of employees will constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Unit A

All full-time and regular part-time RNs, LPNs and caseworkers employed by the Employer at its facility located at 20651 West Warren, Dearborn Heights, Michigan; but excluding managerial employees, maintenance employees, and guards and supervisors as defined in the Act.

²³ As discussed earlier, the record is unclear as to the number of RNs actually employed at the Employer’s facilities. If only one RN is employed by the Employer, he or she may not constitute a single employee unit, as the Board does not direct elections in such units under Section 9(c) of the Act. *Teamsters Local 115*, 157 NLRB 588 fn.3 (1966), citing *Luckenbach Steamship Co.*, 2 NLRB 181, 193 (1936).

Unit B

All full-time and regular part-time maintenance employees employed by the Employer at its facility located at 20651 West Warren, Dearborn Heights, Michigan; but excluding managerial employees, RNs, LPNs, caseworkers, and guards and supervisors as defined in the Act.

If a majority of the RNs do not vote for inclusion in the unit with the LPNs and caseworkers, I find the following three groups of employees will constitute separate units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Unit A

All full-time and regular part-time LPNs and caseworkers, employed by the Employer at its facility located at 20651 West Warren, Dearborn Heights, Michigan; but excluding managerial employees, RNs, maintenance employees, and guards and supervisors as defined in the Act.

Unit B²⁴

All full-time and regular part-time RNs employed by the Employer at its facility located at 20651 West Warren, Dearborn Heights, Michigan; but excluding managerial employees, LPNs, caseworkers, maintenance employees, and guards and supervisors as defined in the Act.

Unit C

All full-time and regular part-time maintenance employees employed by the Employer at its facility located at 20651 West Warren, Dearborn Heights, Michigan; but excluding managerial employees, RNs, LPNs, caseworkers, and guards and supervisors as defined in the Act.

Those eligible shall vote whether they wish to be represented for the purposes of collective bargaining by Michigan Council 25, American Federation of State, County, and Municipal Employees (AFSCME), AFL-CIO.

²⁴ See footnote 23.

Those eligible to vote shall vote as set forth in the attached Direction of Elections.

Dated at Detroit, Michigan, this 7th day of July 2005.

(SEAL)

"/s/ [Stephen M. Glasser]."

/s/ Stephen M. Glasser

Stephen M. Glasser, Regional Director
National Labor Relations Board – Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue – Room 300
Detroit, Michigan 48226

DIRECTION OF ELECTIONS

Elections by secret ballot shall be conducted under the direction and supervision of this office among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those employees in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Employees who are otherwise eligible but who are in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are 1) employees who quit or are discharged for cause after the designated payroll period for eligibility, 2) employees engaged in a strike, who have quit or been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and 3) employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

MICHIGAN COUNCIL 25, AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES (AFSCME), AFL-CIO

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the elections should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 2 copies of the election eligibility lists, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the lists available to all parties to the elections. The lists must be of sufficient clarity to be clearly legible.

The lists may be submitted by facsimile transmission, in which case only one copy of each list need be submitted. In order to be timely filed, such lists must be received in the DETROIT REGIONAL OFFICE on or before **July 14, 2005**. No extension of time to file these lists shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street N.W., Washington D.C. 20570. This request must be received by the Board in Washington by **July 21, 2005**.

POSTING OF ELECTION NOTICES

a. Employers shall post copies of the Board's official Notice of Elections in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sundays, and holidays.

c. A party shall be stopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. */

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

*/ Section 103.20 © of the Board's Rules is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the days of the election that it has not received copies of the election notice.